

San Francisco Bay Conservation and Development Commission

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March 24, 2017

TO: Commissioners and Alternates
FROM: Enforcement Committee
SUBJECT: **Enforcement Committee's Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.01; Scott's Jack London Seafood, Inc.**
(For Committee consideration on April 6, 2017)

Recommendation

The Enforcement Committee recommends that the Commission adopt the Committee's Recommended Enforcement Decision by adopting and issuing proposed Cease and Desist and Civil Penalty Order No. CDO 2017.01 ("Order") to Scott's Jack London Seafood, Inc. ("Scott's").

I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATIONS

On February 13, 1996, the Commission issued BCDC Permit No. 1985.019.08B, as amended through October 7, 1997 ("the Permit"), to Scott's and the Port of Oakland ("Port"). The Permit authorizes Scott's to construct, use, and maintain a 4,400-square-foot open air pavilion within the public open space at Jack London Square for shared public and private use at a ratio of 80 percent public (during which the pavilion would be open to the air) to 20 percent private (during which temporary fabric panels would be in place enclosing the pavilion). The Permit also authorizes the installation of public access site furnishings within the pavilion and the adjacent Franklin Street Plaza.¹

¹ BCDC authorized Scott's to construct and use the pavilion in 1996 by an amendment to the permit first issued to the Port in 1986 (BCDC Permit No. 1985.019) to authorize certain development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets at Jack London Square. On July 8, 1997, the Commission split BCDC Permit No. 1985.019, as amended, into two permits – one issued solely to the Port for all of Jack London Square except for the pavilion ("the Port Permit"), and the other issued jointly to Scott's and the Port for the pavilion. The current Port Permit is BCDC Permit No. 1985.019.022A, as amended through October 22, 2014.

In December 2011, Scott's representatives contacted the BCDC staff to propose modifications to the pavilion, including replacing its labor-intensive canvas wall system with a steel and plastic retractable wall panel system that would transform the open public space into an enclosed private space, and vice-versa, more quickly. Between December 2011 and November 2012, the BCDC staff and Scott's representatives discussed, evaluated, and modified the panel wall proposal without resolution.

In December 2012, BCDC staff learned that Scott's had commenced construction of a large fixed, metal-framed doorway, the proposed panel wall system surrounding the doorway, and other ancillary elements without obtaining BCDC approval. The unauthorized construction continued for approximately four months and was completed in March 2013.

On May 16, 2013, after a site visit by the Executive Director and pursuant to the Commission's regulations, BCDC issued an enforcement letter to Scott's and the Port describing a number of alleged violations of the Permit and the McAteer-Petris Act ("MPA"). The letter directed Scott's and the Port to take specific actions that would preserve their opportunity to resolve the alleged violations with standardized fines. Scott's chose to not remove the unauthorized pavilion modifications and, instead, continued to use the pavilion as a venue for private events for approximately two years. During this time, Scott's engaged in discussions with BCDC staff regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized pavilion modifications but Scott's declined to move forward with any substantive changes.

Upon learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff activated an enforcement investigation. That investigation revealed numerous additional alleged violations, including Scott's extensive unauthorized use of the pavilion for private events during an approximately eleven-year period.

II. SUMMARY OF PROCEEDINGS AND RECOMMENDED ENFORCEMENT DECISION

On October 20, 2016, the Enforcement Committee held a public hearing and adopted the staff recommendation that the Commission issue a proposed stipulated cease and desist and civil penalty order that staff had negotiated with Scott's and the Port. However, at its

November 3, 2016 meeting, the Commission rejected the Enforcement Committee's recommended enforcement decision (*i.e.*, adoption of the proposed stipulated order). The Commission provided comments on certain issues raised by the alleged violations and directed the staff to commence a formal enforcement proceeding if the staff, Scott's, and the Port were unsuccessful in returning to the Enforcement Committee within two months with a different proposed stipulated order that responded to the direction provided by the Commission.

In mid-December, BCDC staff determined that it would not be possible to reach an agreement with Scott's on a revised proposed stipulated order that would be acceptable to the Commission. On December 19th, the Executive Director commenced a formal enforcement proceeding by mailing a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Complaint") to Scott's and the Port. The Complaint proposed a civil penalty of \$841,100 for numerous specified violations of the Permit and the Port's Permit.

On December 22nd, the Executive Director issued an administrative subpoena to Scott's for the production of certain financial records, and on January 18 and 26, 2017, Scott's provided documents to BCDC staff in response to the subpoena.

On January 23, 2017, Scott's and the Port each submitted their respective Statement of Defense and accompanying supporting documents. Scott's generally admitted or did not contest that it performed most of the acts or activities that are alleged in the Complaint to constitute violations of the Permit. However, Scott's generally denied that those acts or activities violated the Permit or instead sought to justify its actions on other grounds.

The Port generally admitted or did not contest the essential allegations of the Complaint, but argued that Scott's, and not the Port, performed the unauthorized construction, over-used the pavilion, and engaged in the other acts or activities that violated the Permit. The Port provided additional factual background to show that the Port investigated, documented, and reported the violations to BCDC. The Port also presented evidence that certain of the violations constitute violations of Scott's lease with the Port, and that the Port made certain efforts to have Scott's come into compliance with both the Permit and its lease.

Neither Scott's nor the Port contested the allegation that the permanent public access guarantee required by the Permit has not been recorded. Scott's claimed that it is not obligated to perform this task because it does not own the pavilion or the underlying land. The Port argued that it is legally prohibited from complying with this Permit requirement due to limitations on the alienation of state tidelands.

On February 3, 2016, the Executive Director issued his recommended enforcement decision, including a proposed Commission Cease and Desist and Civil Penalty Order

On February 16, 2017, the Enforcement Committee held a public hearing on this matter. The Committee considered the staff's presentation of its recommended enforcement decision and the presentations by Scott's and the Port. The Committee also considered public comment by a number of parties.

The Enforcement Committee adopted the staff's recommended enforcement decision and proposed order with the following recommended modifications:

- Dismissal of the Port from the enforcement proceeding (*i.e.*, that the Port not be named as a respondent on the order);
- Inclusion of certain language, suggested by Deputy Attorney General Chris Tiedemann, in Condition III.H of the proposed order requiring the Port and Scott's to record a legal instrument that guarantees public access, as required by the Permit;
- Reducing the proposed penalty from \$841,100 to \$395,360, payable in three annual installments and with the opportunity for Scott's to be entitled to a waiver of 15% of the penalty, in the third year, if Scott's timely complies, and maintains compliance, with the Order, as determined by the Executive Director as of September 1, 2017.

The Enforcement Committee's recommended penalty of \$395,360 is based on its consideration of two alternative potential penalty figures presented by staff at the hearing. Staff's proposed a penalty of \$841,100 for violations that had occurred over an approximately 12-year period, from 2004 to 2016. Staff performed two alternative penalty calculations, using the same daily penalty amounts but for shorter time periods: (1) for the violations that occurred from January 2012, approximately when Scott's approached staff to discuss proposed pavilion modifications, to the present time the penalty would be \$565,910; (2) for the violations that occurred from January 2013, approximately when Scott's engaged in the unauthorized construction of certain pavilion modifications, to the present time the penalty would be \$425,360. The Enforcement Committee's recommended decision imposes penalties for violations that occurred from January 2013 to the present time, but also excludes staff's proposed penalty of \$30,000 for the violation of failing to record a legal instrument to guarantee the public access area. Therefore, the Committee reduced the figure of \$425,360 for violations that occurred during this time period by \$30,000, to \$395,360.